DEC 17 1999

FILED
DEC 17 1999
CLERK

No. 99-6723

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

versus

MICHAEL MOORE, Secretary
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ANTHONY BRADEN BRYAN

DAVID WEISSBRODT
Fredrikson & Byron
Professor of Law
University of Minnesota
Law School
285 Law Center
229-19th Avenue South
Minneapolis, MN 55455
(612) 625-1000
Legal Counsel for
Amicus Curiae Minnesota
Advocates for Human Rights

CONSTANCE DE LA VEGA
Counsel of Record
Professor of Law
University of
San Francisco, Law Clinic
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6752
Attorney for Amicus Curiae
Human Rights Advocates

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF FACTS 3

ARGUMENT 6

I. THE UNITED STATES TREATY OBLIGATIONS SUPPORT PETITIONER'S CONTENTION THAT THE ELECTRIC CHAIR VIOLATES THE EIGHTH AMENDMENT 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Buenoano v. State, 565 So. 2d 309 (1990) 3

Butt v. State of Calif., 4 Cal. 4th 668, 842 P. 2d 1240, 15 Cal. Rptr. 2d 480 (1992) 1

Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 1

Coalition for Economic Equity v. Wilson, 110 F. 3d 1431 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997) 1

Fierra v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994) 11

Hilao v. Estate of Marcos, 103 F. 3d 789 (9th Cir. 1996) 1

Jones v. Florida, 701 So. 2d 76 (1997) 4

La Grande v. Stewart, 173 F. 3d 1144 (9th Cir. 1999) 11

Provenzano v. Moore, No. 95,973, slip op. (Appendix B to the petition for a writ of certiorari).....3, 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. VI, § 2, cl.2 7

U.S. CONST. amend. VIII 8, 9, 11, 12

STATUTES

136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990) 6

138 Cong. Rec. S4781-84 (daily ed., April 2, 1992).. 6, 7, 9

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Charles Chitat Ng, U.N. GAOR, Hum. Rts. Comm., 49th Sess., U.N. Doc. CCPR/C/49/D/469 (1991), reprinted United Nations Home Page, <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0c4df251fe2fbc24802567230056fc46? Opendocument> (visited December 6, 1999) 9

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. a/39/51 (1984) 6

Gen. Comment 20[44], ¶ 6, U.N. Doc. CCPR/C/21/Add. 3(1992) 8

International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) 6, 7

Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995) 7

United Nations Home Page <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part_boo/iv_boo/iv_4html> (visited December 6, 1999) 6

United Nations Home Page <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/partboo/iv boo/iv9html> (visited December 6, 1999). 6

TABLE OF AUTHORITIES – Continued

Page

LAW REVIEW ARTICLES

Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L. L. 1 (1993) 8

Gordan A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CINN. L. REV. 3 (1993) 8

Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471 (1994)..... 8

Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & THE L. REV. 193 (1999) 8

David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993) 7

BRIEF AMICI CURIAE

INTEREST OF AMICI CURIAE

Human Rights Advocates and Minnesota Advocates for Human Rights hereby request that the Court consider this brief pursuant to Rule 37.2(a) in support of Petitioner Bryan. Consent of Petitioner's Counsel of Record and the State District Attorney's Office has been obtained.[1]

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Category II Consultative Status at the United Nations. Human Rights Advocates has duly submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.[2]

---

[1] Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of the brief.

[2] Examples of *amicus* briefs filed by Human Rights Advocates include those in the following cases: *Coalition for Economic Equity v. Wilson*, 110 F. 3d 1431 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F. 3d 789 (9th Cir. 1996); *Butt v. State of Calif.*, 4 Cal. 4th 668, 842 P. 2d 1240, 15 Cal. Rptr. 2d 480 (1992).

Minnesota Advocates for Human Rights, founded in 1983, is the largest Midwest-based non-governmental organization engaged in international human rights work. The organization has some 4,000 members. Minnesota Advocates for Human Rights also has a Special Category II Consultative Status in the United Nations. Minnesota Advocates for Human Rights has received international recognition for a broad range of innovative programs to promote human rights and prevent the violation of those rights.

Human Rights Advocates and Minnesota Advocates for Human Rights would like to take the opportunity to advise this Court of the pertinent international standards that may provide assistance in interpreting the United States constitutional provisions involved in this case. Specifically, Human Rights Advocates and Minnesota Advocates for Human Rights would like to address issues raised by Petitioner regarding the use of the electric chair. The applicable international standards include: 1) two international treaties ratified by the United States, and 2) the interpretation of relevant clauses of one of the treaties by the body specifically charged with enforcing the treaty.

The treaty law in this area requires that the death penalty be applied in such a manner as to cause the least possible physical and mental suffering. The parties have failed to address that requirement. Because the Court may find this new information helpful, Human Rights Advocates and Minnesota Advocates for Human Rights request that the Court consider it.

STATEMENT OF FACTS

In his petition to the Florida Supreme Court challenging his imminent execution by electrocution, Bryan asked the court to consider multiple recent executions in Florida where severe malfunctions occurred. The use of Florida's electric chair does not result in instant death and has in many cases caused condemned prisoners to suffer pain, disfigurement, mutilation, and degradation. The July 1999 execution of Allen Lee Davis, the March 1997 execution of Pedro Medina, and the May 1990 execution of Jesse Tafero have all resulted in severe physical violence inappropriate to the conduct of a civilized society. Because of the unreliability of the Florida electric chair, "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident . . . ' " *Provenzano v. Moore*, No. 95,973, slip op. at 10 (Harding, C.J., joined by Lewis, J., specially concurring) (Appendix B to the petition for a writ of certiorari).

Jesse Tafero was executed on May 4, 1990. "When Tafero's electrocution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches. The flames and smoke emanated from the area around a metallic skull cap, inside of which was a saline-soaked synthetic sponge meant to increase the flow of electricity to the head." *Buenoano v. State*, 565 So. 2d 309, 310 (1990). Due to the smoke and flames, officials stopped the first surge of electricity. After two more jolts were administered, "a medical examiner found that Tafero was dead some six or seven minutes after the execution commenced." *Id.* at 311. "The Department also noted that most executions last longer than seven minutes." *Id.* at 311. Photographs of Tafero's body indicated a

large area of charred and blackened flesh on the top and left-hand side of the head. *Id.* at 314. "According to [medical examiner] Robert H. Kirschner, M.D., Tafero was not dead until the third jolt of electricity was administered and may have remained conscious during the first and second jolts." *Id.* at 314. "Kirschner also concluded that the charring of flesh occurred at least in part because Tafero did not receive the full 2,000 volts of electricity the chair is supposed to administer." *Id.* at 314.

The March 1997 execution of Pedro Medina also included severe mutilation by burning and lasted several minutes. When Pedro Medina was executed on March 25, 1997, the following events occurred:

> When the electrical current was activated, within seconds . . . smoke emanated from under the right side of Medina's head piece, followed by a 4 to 5 inch yellow-orange flame which lasted 4 to 5 seconds and then disappeared. After the flame went out, more smoke emanated from under the head piece to the extent that the death chamber was filled with smoke – but the smoke was not dense enough to impair visibility in or through the chamber. The smoke continued until the electrical current was shut off in the middle of the third cycle. *Jones v. Florida*, 701 So. 2d 76, 86 (1997).

When no pulse or heart sounds were detectable, the attending physician, Dr. Almojera, examined Medina and pronounced him dead at 7:10 a.m. *Id.* at 86. During Dr. Almojera's last examination Medina's chest was seen to move two or three times in a two to four minute period, and a couple of witnesses thought Medina was trying to breathe. *Id.* at 86. "Several witnesses did not describe it as

attempted breathing, but as a lurching, spasmodic movement, a shudder, and outward not upward movement." *Id.* at 86.

The most recent use of Florida's electric chair involved the "bloody" execution of Allen Lee Davis on July 8, 1999. *Provenzano v. Moore*, slip op. at 25 (Shaw, J., joined by Anstead, J. dissenting) (Appendix B to the petition for a writ of certiorari). According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth strap across his mouth and nose, which likely caused partial suffocation. *Id.* at 48 (Appendix B to the petition for a writ of certiorari). Prior to the actual electrocution, blood began flowing from his nose. Dr. Robert Kirschner, the forensic pathologist who conducted the post-execution autopsy, concluded that Davis had at least been partially asphyxiated prior to electrocution. *Id.* at 49 (Appendix B to the petition for a writ of certiorari). Aubrey D. Thornton, Assistant Warden at Florida State Prison testified that Davis' face began to turn red after the mouth strap was applied. After Davis' airflow had been blocked, he made several sounds under the face-mask which were described as muffled screams, moans, or yells, as if he were attempting to get the guards' attention. *Id.* at 49 (Appendix B to the petition for a writ of certiorari).

These examples highlight some of the worst instances of physical pain and mutilation inflicted on condemned prisoners in Florida. In light of the continued malfunctions in Florida's electric chair over the past decade, the Court must consider whether the use of that method of

execution violates the Eighth Amendment as well as treaty standards.

ARGUMENT

I. UNITED STATES TREATY OBLIGATIONS SUPPORT PETITIONER'S CONTENTION THAT THE ELECTRIC CHAIR VIOLATES THE EIGHTH AMENDMENT

The International Covenant on Civil and Political Rights (G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (hereinafter "Covenant")) is a United Nations treaty ratified by the United States in 1992. (138 Cong. Rec. S4781-84 (daily ed., April 2, 1992).) As of December 6, 1999, there were 144 parties to the Covenant. (*See* United Nations Home Page <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part___boo/iv___boo/iv___4html> (visited December 6, 1999).) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (hereinafter "Convention Against Torture")) is also a treaty ratified by the United States in 1994. (136 Cong. Rec. S17486-92 (daily ed., Oct 27, 1990).) As of December 6, 1999, there were 118 parties to the Convention. (*See* United Nations Home Page, <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part___boo/iv___boo/iv___9.html> (visited December 6, 1999).)

Under Article VI, clause 2, of the United States Constitution, a ratified treaty is part of the supreme law of the land. Ratification is not to be treated lightly, and such action by the President and the Senate evidences the acceptance of the language of the Covenant, except to the extent that reservations are specified. The document should, therefore, provide meaningful guidance to the Court.[3]

Article 7 of the Covenant provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Covenant, art. 7.) Article 4(2) of the Covenant indicates that Article 7 is at no times derogable. (Covenant, art. 4.) In addition to the prohibition against torture, the Convention Against Torture in Article 16 provides:

---

[3] The Senate consent to the Covenant was accompanied by a declaration "that the provisions of Articles 1 through 27 are not self-executing." (138 Cong. Rec. S4783 (daily ed., April 2, 1992).) The legislative history shows that those words were intended to prohibit only a private and independent cause of action. The declaration does not preclude courts from using the treaty as a guide in elucidating constitutional guarantees. The United States government's position is that "courts could refer to the Covenant and take guidance from it." (Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995).) Further, the declaration does not affect the obligations of the United States under the Covenant. (*See*, David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).)

> "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The Human Rights Committee is the body which officially monitors compliance with the Covenant. In its comments concerning Article 7 the Committee stated that "when the death penalty is applied by a State party for the most serious crimes, . . . it must be carried out in such a way as to cause the least possible physical and mental suffering." (Gen. Comment 20[44], ¶ 6, U.N. Doc. CCPR/C/21/Add. 3 (1992).) The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." (U.S. Const. amend. VIII.) Because the United States now has ratified the Covenant, the development of Article 7 should help courts construe the scope of the Eighth Amendment's final clause. The Covenant has become a part of United States law and thus surely is relevant to the meaning of the Eighth Amendment.[4]

---

[4] International human rights standards have often been useful tools for interpreting United States laws. *See generally,* Connie de la Vega, *Protecting Economic, Social and Cultural Rights,* 15 WHITTIER L. REV. 471, 476-77 (1994); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. CIN. L. REV. 3 (1993). *See also,* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 1 RUTGERS RACE & THE L. REV. 193 (1999); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective,* 14 MICH. J. INT'L L. 1 (1993).

From the evidence in this case it seems apparent that the imposition of the death penalty by the electric chair does violate Article 7, as plainly written and officially construed. The electric chair does not "cause the least possible physical and mental suffering."[5]

The Human Rights Committee was given the opportunity to again construe Article 7 in the case of *Charles Chitat Ng* (U.N. GAOR, Hum. Rts. Comm., 49th Sess., U.N. Doc. CCPR/C/49/D/469 (1991), *reprinted in* United Nations Home Page, <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0c4df251fe2fbc2480256723 0056fc46?Opendocument> (visited December 6, 1999).) After fleeing to Canada, Ng was returned to the United States under the extradition treaty between the two nations. He submitted to the Human Rights Committee a communication claiming that the extradition to California exposed him to probable execution by gas asphyxiation which violated his rights under the Covenant. Under the extradition treaty, Canada could have sought assurance that he would not be punished with death, but did not.

---

[5] The United States reservation (to the Covenant) that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments (138 Cong. Rec. S4783 (daily ed., April 2, 1992)) by no means precludes Article 7's application to this case. Article 7 is not inconsistent with the Eighth Amendment regarding the facts of this case. The language of the Eighth Amendment is broad enough to forbid the use of the electric chair as a means of execution, and United States courts should not ignore international pronouncements on treaties to which it is party.

The Human Rights Committee concluded that Canada violated Article 7 when it refused to seek such assurance since it could reasonably have foreseen that Ng, if sentenced to death, would be executed by means of lethal gas. The Committee specifically held that "execution by gas asphyxiation, should the death penalty be imposed on [Ng], would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment . . . " and Canada thus violated Article 7 of the Covenant. *Id.* at 21. The Committee based its findings on evidence submitted by Ng regarding the length of consciousness after asphyxiation begins. Ng also references the execution record of Robert Harris, noting that death by asphyxiation can take up to twelve minutes, during which time "condemned persons remain conscious, experience obvious pain and agony, drool and convulse and often soil themselves." *Id.* at 14.

The botched executions in Florida have evidenced similar suffering by the people being put to death as was described in the Ng case, both in the length of time involved as well as the physical manifestations of pain. Several of the cases in Florida have taken seven minutes or more for the person to die. The blood, attempts to breathe and scream, and partial asphyxiation are all indications of the extreme pain that has been involved in those cases. Interestingly, a court in California made the following factual findings with respect to death by lethal gas:

> Inmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of

> lethal gas. An inmate probably remains conscious anywhere from 15 seconds to one minute, and there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects to the cyanide gas include tetany, an exquisitely painful concentration of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain. *Fierro v. Gomez*, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994).

Even though the district court's decision has been vacated, the Ninth Circuit has upheld the findings of extreme pain and has concluded that the use of execution by lethal gas is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments. *See La Grande v. Stewart*, 173 F. 3d 1144, 1149 (9th Cir. 1999). That decision is in conformity with the Human Rights Committee decision in the Ng case.

At this point in Florida, persons on death row not only face the possibility of being subjected to extreme pain, but in addition must suffer the anxiety that it may. *Amici* ask the Court to consider the significant parallel between the cases and the treaty standards that apply when reviewing the facts of this case.

CONCLUSION

The evidence in this case clearly indicates that the imposition of the death penalty by the electric chair violates the International Covenant on Civil and Political Rights. Because the United States is a party to the treaty, the Eighth Amendment should be construed so as not to conflict with it. Hence, the decision of the Supreme Court of Florida should be reversed.

Respectfully submitted,

Dated: December 17, 1999

CONSTANCE DE LA VEGA
Counsel of Record
Attorney for *Amicus Curiae*
Human Rights Advocates

DAVID WEISSBRODT
Legal Counsel for *Amicus Curiae*
Minnesota Advocates for
Human Rights

(10)